No. 50161-9-II

IN THE COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MELFORD WARREN, Appellant

APPEAL FROM THE SUPERIOR COURT

OF KITSAP COUNTY

THE HONORABLE JUDGE MELISSA HEMSTREET

BRIEF OF APPELLANT

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II. STATEMENT OF FACTS

Kitsap County prosecutors charged Melford Warren by third amended information with 22 crimes: five counts rape of a child first degree; three counts child molestation first degree; two counts sexual exploitation of a minor; six counts assault of a child second degree; one count criminal mistreatment; one count assault fourth degree; two counts assault of a child third degree; and two counts assault in the second degree. Special aggravating factors were alleged on various charges: members of the same family, pattern of ongoing abuse, use of position of trust to facilitate the crime, and especially vulnerable victim. CP 819-944.

Mr. Warren, his two female partners, and their twelve children lived in Kitsap County between September 2013 and September 2014. 11RP 1765;1820. On September 14, 2014, a Department of Natural Resources officer responded to a call at a campfire site in Kittitas County. 11RP 1721. He discovered several unsupervised children at the campsite. 11RP 1725. Sometime later Mr. Warren arrived. Officers arrested him and took the children into protective custody. 11RP 1725-1727.

During their stay in foster care, several of the children disclosed alleged abuse. 12RP 1858. Two of the older children reported that on two occasions Mr. Warren directed them to have sexual intercourse while he stayed in the room and instructed them. 13RP 2037-2039; 14RP 2268-2272.

For those two alleged incidents, the State charged both child molestation first degree and sexual exploitation of a minor (two incidents, four charges). CP 822-825.

Counts IV and VI were charged as follows:

> Sexual Exploitation Of A Minor
>
> On or about September 1, 2013 and September 15, 2014, in the County of Kitsap, State of Washington, the above-named Defendant compelled a minor, to-wit, G.P.J. 07/05/20014,

being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct knowing that the conduct would be photographed or be a part of a live performance, contrary to the Revised Code of Washington 9.68A.040.

CP 823, 825.

The court gave Jury Instruction number 15:

To convict the defendant of the crime of sexual exploitation of a minor as charged in Count IV each of the following elements must be proved beyond a reasonable doubt:
(1) That on or about or between September 1, 2013 and September 15, 2014, the defendant being a parent permitted the minor to engage in sexually explicit conduct;
(2) That the defendant knew the conduct would be photographed or would be part of a live performance; and
(3) That any of these acts occurred in Kitsap County, State of Washington.

CP 865

The court gave the same "to convict" instruction as Jury Instruction number 21, for Count VI. CP 872.

The trial court gave Jury Instruction number 14:

A person is guilty of sexual exploitation of a minor if the person being a parent permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or will be part of a live performance.

CP 864

Jury Instruction number 18:

> To photograph means to make a print, negative, slide, digital image, motion picture, or videotape. A photograph means anything tangible or intangible produced by photographing.
>
> Live performance means any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more.

CP 869

The jury convicted Mr. Warren on 15 of 22 counts, including two counts of sexual exploitation of a minor. CP 926-927. It found aggravating factors on those counts, and other charged counts. CP 933-955. The court imposed 1,710 months of incarceration. CP 994. Mr. Warren makes this timely appeal. CP 1007.

III. ARGUMENT

A. The Evidence Was Insufficient To Sustain The Convictions For Sexual Exploitation Of A Minor.

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as a due process violation. *State v. Hickman,* 135 Wn.2d 97, 954 P.2d 900 (1998). Under the due process rights guaranteed under both the Washington Constitution, Article 1 § 3, and the United States Constitution Fourteenth Amendment, the state must prove every element of a crime beyond a reasonable doubt. *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d 646 (1983). In a challenge to the sufficiency of the evidence,

the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

In a sufficiency of the challenge in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the state. *State v. Salinas*,192 Wn.2d 192, 201, 829 P.2d 1068 (1992). The conviction must be reversed for insufficient evidence where no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012)(rev. denied, 176 Wn.2d 1003, 297 P.3d 67 (2013)).

The State charged Mr. Warren with and instructed the jury on RCW 9.68A.040(1)(c).

> (1) A person is guilty of sexual exploitation of a minor if the person:
> (c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

CP 823,825,865,872. (emphasis added).

1. Sufficient Evidence To Sustain A Conviction Under RCW 9.68A.040(1)(c) Required Commission Of An Act Under RCW 9.68A.040(a) or (b).

In *State v. Chester,* the Court found the defendant's conduct did not violate the statute prohibiting sexual exploitation of a minor. *State v. Chester,* 82 Wn. App. 422, 918 P.2d 514 (1996). There, the defendant placed a camera under his stepdaughter's bed in hopes of surreptitiously capturing images of her in stages of undress. *Id.* at 18. The state charged him under RCW 9.68A.040(1)(b) and (c). The question on appeal was whether Chester's conduct as a voyeur violated the statute. *State v. Chester,* 82 Wn.App. 422, 918 P.2d 514 (1996). The Court held (1)(b) had not been violated because the defendant had not communicated with or assisted his stepdaughter as required under that subsection. *Id.* at 428.

Pertinent to this case, regarding RCW 9.68A.040(1) subsection (c) the Court held:

> The Legislature did not intend that a parent could violate subsection (c) without evidence that someone violated either subsection (a) or (b). *When the parent is the only actor who has induced the conduct of the minor*, *that parent can be convicted* ***only*** *under RCW 9.68A.040(a) or (b)*. To infer

> personal gratification from the parent's act of watching or photographing, without more, extends the reach of this statute to parental conduct the Legislature did not intend to prohibit.

Id. at 429. (Emphasis added).

The Supreme Court affirmed the Court of Appeals, holding the aim of RCW 9.68A.140(1)(c) is to "*prohibit a parent from allowing a child to be exploited under subsection (a) or (b) of the statute.*" *State v. Chester,* 133 Wn.2d 15, 940 P.2d 1374 (1997). (emphasis in the original). The Court held that if a parent were actively involved in causing the exhibition or other sexually explicit conduct, then the parent would be subject to the terms of section (a) or (b). The Court interpreted RCW 9.68A.140(1)(c) "*to prohibit the parent's knowing failure or refusal to protect his or her child from sexual exploitation by another*." *Id.* at 23-24. (Emphasis in the original).

Here, the State charged Mr. Warren and the court instructed the jury only on subsection (c). Because the state alleged he was the only actor, but did not charge him under RCW 9.69A.040(1)(a) or RCW 9.68A.040(1)(b), the evidence cannot sustain a conviction under subsection (c).

2. The Alleged Conduct Does Not Meet The Statutory Definition of “Live Performance”.

RCW 9.68A.040(1) prohibits individuals from compelling, aiding, inviting, authorizing, causing or, if a parent, permitting a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance.

RCW 9.68A.140(3) defines “live performance” as “any play, show skit, dance or *other exhibition* performed or presented to, or before an audience of one or more, with or without consideration.” The phrase “other exhibition” means a type of performance “similar in nature to the terms preceding it”, play, show, skit or dance. *State v. Wissing,* 66 Wn.App. 745, 753, 833 P.2d 424 (1992). The *Wissing* Court reasoned that if the term “exhibition was intended to mean something different from or independent of ‘play, show, skit or dance’, then use of the word “other” preceding exhibition “would be superfluous.” *Id.* at 753.

There are no published cases that specifically address whether particular conduct amounts to a “live performance” under this statute. However, a recent unpublished case provides insight and an example of the term “live performance.”

In *State v. Wheeler,* 193 Wn.App. 1013, 2016 WL 1306132[1], the police conducted a sting operation on a drive thru ”bikini barista” espresso stand. The pay for the young female baristas was based solely on tips, rather than a wage. To earn tips, the baristas displayed their breasts and private parts to customers and put on sexually explicit shows for customers on request. One underage barista performed such exhibitions and allowed customers to touch her. The Court reasoned the conduct was a “live performance” under the statute.

Here, the alleged conduct does not meet the definition of a “live performance.” In closing argument, the state argued that because Mr. Warren allegedly watched the children attempting to have intercourse, it was a live performance[2]. This interpretation of

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[1] GR 14.1(a) provides in pertinent part: “Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.”

[2] What he did -- he not only permitted the minor to be engaged; he instructed. He instructed these two people to be engaged in sexually explicit conduct. And it was part of a live performance. It was for him. He got to watch his two kids having sex. RP 2428.

"live performance" does not meet the statutory definition and the facts of the case do not meet the definition of a "live performance."

The evidence is insufficient and the convictions for sexual exploitation of a minor must be reversed and vacated. *Chouinard*, 169 Wn App. at 899.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Warren respectfully asks this Court to reverse and vacate the convictions for sexual exploitation of a minor and the corresponding exceptional sentences.

Respectfully submitted October 3, 2017.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Melford Warren, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on October 3, 2017 to

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And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following:
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